

No. 14674

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE AND
GILLESPIE GAMES COMPANY, a Corporation,
Appellants,

vs.

COMA F. NORRIS, Individually and Doing Business as
C. F. NORRIS MANUFACTURING COMPANY,
Appellee.

APPELLANTS' CLOSING BRIEF.

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APPELLANTS' CLOSING BRIEF.

I.

Answer to Appellee's Argument That the Basis for the Motion for Summary Judgment Was Determined Solely on the Disclosures Found in the Dorsey and Andrews Patents.

Appellee's argument in attempting to justify the trial court's decision in granting the motion for summary judgment as based *solely* on the disclosures found in the Dorsey and Andrews patents, fails to state the very elements which made this device acceptable to the game industry and which were responsible for the failure of the Andrews and Dorsey patents to succeed.

In his statement of the *elements* of the claims in dispute, Appellee on page 6 of his brief fails to take into account the following elements disclosed in the Gillespie Patent, namely:

Claim 13:

“Enclosure means . . ., including walls and a transparent cover supported by supporting means slightly above the top edge of the walls and forming a slit-like opening with said walls; and a horizontal stationary launching platform completely surrounding the enclosure means and disposed above the playing field adjacent to said slit-like opening and outside of the enclosure means . . .”

Claim 12:

“Enclosure means . . . including a cover and supporting means for said cover, said supporting means being provided with slit-like apertures *below said cover* adapted for the transfer therethrough of the playing pieces; . . . a substantially horizontal stationary platform disposed adjacent said slit-like apertures in the cover *supporting means* and outside of said enclosure, . . .”

Claim 11:

“. . . a substantially horizontal stationary platform disposed outside of said enclosure adjacent said playing field at a sufficient distance thereabove and forming a slit-like opening *with the enclosure means*.
. . .”

Claim 3:

“. . . a horizontal stationary launching platform disposed a sufficient distance above said playing field outside of said housing and forming a slit-like opening with said *cover*. . . ; means for displacing

the playing pieces from the playing field at the conclusion of a game; said displacing means including a horizontally disposed sweep means operatively attached to a shaft extending through said playing field and extending completely over the horizontal playing field; and means for turning said shaft to rotate said sweep.”

Claim 2:

“. . . ; a horizontal stationary launching platform disposed a sufficient distance above said playing field and outside of said housing and forming a slit-like opening with said cover, so that disc-like playing pieces manually trajected from said platform through said slit-like opening and through the air into said playing field; and horizontally disposed sweep means extending completely over the horizontal playing field for removing the playing pieces from the playing field at the conclusion of a game.”

Claim 1:

“. . . ; a horizontal stationary launching platform disposed a sufficient distance above said playing field and outside of said housing and forming a slit-like opening with said cover so that disc-like playing pieces may be trajected from said platform through the slit-like opening and through the air on to said playing field; and means for displacing the playing pieces from the playing field at the conclusion of a game.” (Emphasis added.)

None of the above stated elements can be found either in the Andrews patent or in the Dorsey patent disclosures.

The above stated elements are the material elements which made plaintiffs' invention the commercial success referred to in Appellants' Opening Brief.

It is respectfully submitted that the instant invention was not *anticipated* by the two patents which allegedly form the *sole* basis for the Court's decision, because under the settled law applicable to "anticipation" all of the elements of the invention or their equivalent must be found in *one single description* or structure where they do substantially the same work in substantially the same way.

Imhaeuser v. Buerk, 101 U. S. 647, 660 (1879),
25 L. Ed. 945;

Bates v. Coe, 98 U. S. 31 (1878), 25 L. Ed. 68;

*Ottumwa Box Car Loader Co. v. Christy Box Car
Loader Co.* (C. C. A. 8), 215 Fed. 362;

Ventilated Cushion & Spring Co. v. D'Arcy (C. C.
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*Dow Chem. Co. v. Williams Bros. Well Treating
Co.* (C. C. A. 10, 1936), 81 F. 2d 495, 501;

Universal Oil Products Co. v. Winkler-Kock E. Co.
(D. C., D. Del., 1934), 6 Fed. Supp. 763, 770,
aff'd 7 F. 2d 991 (C. C. A. 3, 1935).

The two cited patents utterly fail in the test if applied to defendant's claim of "anticipation."

Contrary to defendant's claim on pages 6 and 7 of his brief neither the operation nor the function of the cited patents is identical with the instant patent.

The player, using the Andrews' invention *cannot aim* the playing piece and, as stated in Appellants' Opening Brief, the *aiming* of the coins was purposely and intentionally avoided by making the vertical slots so narrow as to permit only a mere *dropping* of the playing piece, and the coin cannot be trajected onto the playing field, the line

of drop of the playing piece in the Andrews patent being a straight line vertical *drop* rather than a *trajectory*.

The instant patent, therefore, with the elements disclosed in the claims thereof, accomplishes a dual function by not only making the playing field inaccessible to the player, but by permitting the player to aim the playing piece through the slit-like opening formed by the *cover supporting means between the cover and the enclosure* onto the very spot which he has selected as the target on the playing surface. The player of the Andrews device has no control over the direction of the playing piece which is vertical, and vertical only.

Concerning the horizontal stationary launching platform never before disclosed in any patent application, as far as either plaintiff, defendant, or the patent office could discover, Appellee states on page 8 of his brief that "when Gillespie decided to provide a claim incorporating horizontal slits, it must have been obvious that a shelf or platform would be convenient for use therewith."

It is respectfully submitted that the fact that Gillespie was the person who 45 years after issuance of the Dorsey patent and 11 years after the issuance of the Andrews patent first discovered this device, and was able to make a commercial success with it, militates against Appellee's contention that the disclosures by Dorsey or Andrews as leading to the horizontal stationary launching platform, were "obvious."

Appellee is not assisted by any part or portion of the holding of this Court in *Jacuzzi Bros., Inc. v. Berkley Pump Co.* concerning the statement by this Court that "even one prior art reference which has not been considered by the patent office may overthrow the presumption of validity," because if validity is a *question of fact*

than, a trial court may, as the trier of facts, *upon a trial of the case*, make a determination of “anticipation,” provided that the prior art reference *meets* the test of “anticipation.”

It is, therefore, respectfully submitted that the ruling of the Court in granting defendant’s motion for summary judgment *based solely* upon Andrews and Dorsey is against the settled law applicable to the instant case.

II.

Answer to Defendant’s Argument That the Dorsey and Andrews Patents Are Sufficient Evidence of Themselves to Support the Findings and Conclusions of the Trial Court.

Contrary to Appellee’s contention, it is the settled law relating to motions for summary judgment that a summary judgment presupposes that there are no triable issues of fact and accordingly findings of fact and conclusions of law *are not required*. (*Lindsey v. Leavy* (C. C. A. 9th, 1945), 149 F. 2d 899, cert. den. 66 S. Ct. 331, 326 U. S. 783, 90 L. Ed. 474; *Filson v. Fountain* (App. D. C. 1948), 171 F. 2d 999.)

Where a timely appeal is taken from an appealable order granting summary judgment, the Appellate Court must determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substantive law was correctly applied.

Koepke v. Fontecchio (C. C. A. 9th, 1949), 177 F. 2d 125.

Under the principles applicable to summary judgment the trial court *must* resolve all reasonable doubts concerning the existence of a genuine issue as to a material fact

against the moving party; and a judgment granted in violation of those principles is subject to reversal by the Appellate Court.

Lane Bryant v. Maternity Lane Ltd. (C. C. A. 9th, 1949,) 173 F. 2d 559, 565;

Pacific American Fisheries v. Mullaney (C. C. A. 9th, 1951), 191 F. 2d 137.

Appellee's statement on page 11 of his brief that "Appellants have failed to challenge a single finding," overlooks the issues raised by this Appeal, and the arguments in support thereof.

Appellants' statement of the commercial success of the Gillespie patent and its universal acceptance by the game industry, as well as Appellants' contention that defendant copied Appellants' invention *after* its disclosure by plaintiffs to defendant remains unchallenged except for Appellee's statement on page 11 of his brief that "this evidence would simply augment the Andrews and Dorsey patent disclosures."

These issues, the existence of which Appellee admits, are genuine issues of material fact which should have been submitted to a jury.

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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